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LIABILITY OF THE MASTER FOR INJURIES RECEIVED BY CHILDREN ON OR ABOUT MOVING VEHICLES AT THE UNAUTHORIZED INVITATION OF THE SERVANT IN CHARGE

FRANK W. ROGERS*

There are literally scores of reported cases involving the liability of the master for injuries received by children on or about moving vehicles at the invitation of the servant in charge. And each new volume of reports brings additional opinions. Obviously the explanation of the multiplicity of cases on this point lies in the apparent irreconcilability of different decisions in even the same jurisdiction.

The justices deciding these various cases speak with a confusion of tongues that is no less disconcerting than in the scriptural instance. Yet, strangely enough, the fundamental principles involved have been so long established as to receive universal acceptance. It is in the application of these principles, or through the failure to apply them, that this unwarranted confusion has arisen. It is submitted that if adherence would only be had to these bed-rock principles, there could be no basis for contrariety of opinion.

The first essential is a proper conception of the doctrine of *respondeat superior*. It may be found in a North Carolina case.[1] The opinion of Justice Brown there points out that in consideration for the privilege of transacting business through servants, the law has imposed upon the master vicarious responsibility for their torts, even though committed without his knowledge or consent. But to this harsh rule, there is an important limitation: the master may not be held liable for the act of the servant beyond the scope of his employment, for then the servant acts not for the master but for himself. As simple as this proposition may seem, there are numerous decisions against the master apparently predicated upon no other theory than that he had placed the servant in charge of the vehicle by which the plaintiff was injured and was therefore responsible for every default of the servant while so situated.

The second essential to a correct solution of these cases is recognition of a corollary of the first proposition: the exemption of the master from liability for the act of the servant without the scope of his employment extends also to the proximate and direct consequences of the act.[2] It is obvious that if the master is not responsible for the act of a servant in striking the plaintiff,

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*Reprinted by permission from 12 Virginia Law Review 34. The author is a member of the bar of Roanoke, Va.

(1) Dover v. Mayes Mfg. Co., 157 N. C. 324, 72 S. E. 1067, 46 L. R. A. (N. S.) 199. See also Goodloe v. Memphis, etc., R. Co., 107 Ala. 233, 54 Am. St. Rep. 67; Keating v. Mich. Cent. R. Co., 97 Mich. 154, 37 Am. St. Rep. 328.

(2) Dougherty v. Chicago, etc., R. Co., 137 Iowa 257, 114 N. W. 902, 14 L. R. A. (N. S.) 590, 126 Am. St. Rep. 282; see also other cases, post.

neither can he be held for the effects of the blow. Yet failure to apply this universally accepted principle has resulted in much of the confusion now existing in this branch of the law.

The third essential principle is also an obvious corollary of the first proposition: the liability of the master is not affected by the infancy of the servant's invitee. "His youth might excuse contributory negligence—but cannot create rights or duties which have no other foundation."[3] For, as has been seen, the responsibility of the master depends on the relationship between him and the person purporting to act as his servant.

Starting with these universally accepted fundamentals, it will be interesting to note how far apart different courts have been led in their application.

Limiting this discussion to commercial or freight vehicles, it may first be noted that in the absence of express or implied authority from the master, the presumption is that the servant is acting without the scope of his employment in permitting a child on or about the vehicles.[4] And where there is no evidence of such authorization, the court should so rule *as a matter of law*?[5] If the presence of the child is the result of an unauthorized invitation of the driver, it follows that *quoad* the master the child is a trespasser.[6] This is necessarily true because the invitation or permission of the servant in such a case is not that of the master. There is no denial of this conclusion by even the courts holding the master liable on other grounds.[7]

So also are the courts in accord in holding the master free from liability for injuries sustained by the child in attempting to board even a moving vehicle in response to an unauthorized invitation of the driver.[8] One reason correctly assigned in these cases is that the child's injury is the direct and proximate consequence of the driver's invitation, an act without the scope of his employment. And as the master is not responsible for the invitation, neither is he liable for the consequences thereof.[9] Another equally logical ground of non-liability is that the master is not required to anticipate that children will attempt to board his vehicle, and hence owes through his servant no duty to guard against or prevent their doing so.[10] So also these decisions could be sustained on the ground that as the children are trespassers *quoad* the master, he is not liable for injuries received by them through the negligence of his servant.[11]

Thus far there is no disagreement. But in some of the cases there are inferences to the effect that the result might be different if the negligence of the servant were of a wanton or willful character.[12] No logical basis can be

(3) Flower v. Penna. R. Co., 69 Pa. St. 210, 8 Am. Rep. 251, 255; Walker v. Potomac, etc., R. Co., 105 Va. 226, 53 S. E. 113. See also other cases, post.

(4) Christie v. Mitchell, 93 W. Va. 200, 116 S. E. 715; O'Leary v. Fash (Mass.), 140 N. E. 282.

(5) Perrin v. Glassport Lbr. Co., 276 Pa. St. 8, 119 Atl. 719.

(6) Flower v. Penna. R. Co., supra, note 3; Virginia Midland R. Co. v. Roach, 83 Va. 375, 5 S. E. 175.

(7) Higbee v. Jackson, 101 Ohio St. 75, 128 N. E. 61, 14 A. L. R. 131.

(8) Sweeden v. Atkinson Imp. Co., 93 Ark. 397, 125 S. W. 439, 27 L. R. A. (N. S.) 124; Tate v. Atlantic Ice & Coal Corp., 25 Ga. App. 597, 104 S. E. 913; Bowler v. O'Connell, 162 Mass. 319, 44 Am. St. Rep. 359; New Orleans, etc., R. Co. v. Harrison, 48 Miss. 112, 8 Am. Rep. 356; Goldberg v. Bordens Condensed Milk Co., 227 N. Y. 465, 125 N. E. 807.

(9) Bowler v. O'Connell, supra, note 8.

(10) Kalmich v. White, 95 Conn. 568, 111 Atl. 845; Gamble v. Uncle Sam Oil Co., 100 Kan. 74, 163 Pac. 627, L. R. A. 1917D, 875.

(11) Sweeden v. Atkinson Imp. Co., supra, note 8; Goldberg v. Bordens Condensed Milk Co., supra, note 8.

seen for the distinction. On the contrary, there are at least two good reasons against it.

The theory of liability in such a case presumably would be that even a trespasser may recover for a wanton injury. But he must at least be a discovered trespasser,[13] for the foundation of liability is built upon knowledge of his peril. So also his presence must be known not only to the servant but also to the master either actually or constructively, if the master is to be held liable for the injury, for the theory of liability is that the master having such knowledge of the trespasser's peril, commits, through his *alter ego,* the servant, the wrong complained of. But where the presence of the trespasser is due to the unauthorized invitation of the servant, knowledge thereof is not chargeable to the master, because the presence of the trespasser is the direct and proximate consequence of an act without the scope of the servant's employment. If the master is not responsible for the invitation, he cannot logically be held for the consequences of its acceptance. In other words, if the invitation of the servant is not the invitation of the master, then neither can the knowledge of the servant that it has been accepted be the knowledge of the master.

Viewing the proposition from a slightly different angle, it may be said that ordinarily the law presumes that the servant will communicate to his master information gained in the course of the master's business, and therefore the master is generally chargeable with the knowledge of the servant. But this fiction is not followed to a violation of the known principles of human nature, and where the servant is deviating from his employment, as in inviting children to ride or play on the vehicle, the presumption is that he did not communicate to his master that which it was to his own interest to conceal.[14]

The distinction between the cases in which the knowledge of the servant is and is not the knowledge of the master makes easily reconcilable two recent Georgia decisions apparently in direct conflict. In both a child was injured by the wanton act of the servant in speeding up the truck while the child was attempting to board it. In the first case the child was not acting upon an invitation from the driver and as the latter had not acted without the scope of his employment, his knowledge of the child's peril was properly imputed to his master.[15] In the later case, the boy's attempt to board the truck was in direct response to the unauthorized invitation of the servant and as the master was not chargeable with knowledge of his presence, recovery against the master was denied.[16] In both cases, it may be observed, a trespasser was injured by the wanton conduct of a servant. In both the servant would have been liable for the injuries sustained. But as against the master, liability existed only in the case in which the presence of the plaintiff was discovered to the master through the knowledge of a servant acting within the scope of his employment.

It has been argued that a child who has secured an invitation or permission from the driver should not be in a worse position than if he had attempted

(12) Goldberg v. Bordens Condensed Milk Co., supra, note 8.

(13) Salemme v. Malloy (Conn.), 121 Atl. 870; Rout v. Look (Wis.), 191 N. W. 557.

(14) Culpeper Natl. Bank v. Tidewater Imp. Co., 119 Va. 73, 89 S. E. 118.

(15) Madden v. Mitchell Automobile Co., 21 Ga. App. 108, 94 S. E. 92.

(16) Tate v. Atlantic Ice & Coal Corp., 25 Ga. App. 597, 104 S. E. 913.

to mount the truck without permission."[17] But this is true *only as to the servant* and not as to the master. It is well settled that by no act without the scope of his employment can a servant impose additional liability or responsibility on his master.[18]

The second and equally cogent reason against liability on the part of the master where the child acts in response to an unauthorized invitation of the driver is that the mere wanton or malicious character of the servant's act will not alone bring it within the scope of his employment.[19]

The argument that even though the invitation was unauthorized, the sudden acceleration of the speed of the truck was within the scope of the servant's employment, runs counter to the fundamental proposition that a master not liable for the act of the servant is not liable for the consequences thereof. The invitation and the speeding up are part and parcel of the same transaction, inextricably connected. The contention has been effectually disposed of in cases involving both wanton[20] and willful[21] injury.

There appears to be no case holding the master liable where the injury was received while the child was attempting to board the vehicle in response to an unauthorized invitation of the servant in charge. It may consequently be said that the courts are in accord on the point, although the correct reasons for the decisions are not always given.

After the child has safely gotten aboard the vehicle, the question arises as to the liability of the master for injuries sustained by the child as a result of the operation of the truck. Here the servant is unquestionably acting within the scope of his employment. But as the child is present on the vehicle as the invitee of the servant and not of the master, he occupies the status of a trespasser *quoad* the master. Consequently, the courts are agreed in denying liability against the master where the negligence of the servant is not wanton or willful.[22] In this connection it may be noted that failure to exercise ordinary care for the safety of one discovered in a perilous position is wanton negligence.[23]

Cases involving injury by willful or wanton acts of the servant disclose a curious conflict in the authorities. On principle, there would seem to be no liability on the master, for as to him the servant's invitee is an *undiscovered* trespasser. As pointed out above, knowledge of the presence of a trespasser is the very foundation of liability[24] and, for the reasons already given, the knowledge of the servant in such a case is not imputable to the

(17) Highbee v. Jackson, supra, note 7.

(18) Karas v. Burns, 94 N. J. L. 59, 110 Atl. 567.

(19) New Orleans, etc., R. Co. v. Harrison, supra, note 8; Kiernan v. N. J. Ice Co., 74 N. J. L. 175, 63 Atl. 175.

(20) Driscoll v. Scanlon, 165 Mass. 348, 52 Am. St. Rep. 524.

(21) Kiernan v. N. J. Ice Co., supra, note 19.

(22) Houston, etc., R. Co. v. Bolling, 59 Ark. 395, 43 Am. St. Rep. 38, 27 L. R. A. 191; Waller v. Sou. Ice & Coal Co., 144 Ga. 695, 87 S. E. 888; Dougherty v. Chicago, etc., R. Co., 137 Iowa 257, 114 N. W. 902, 14 L. R. A. (N. S.) 590, 126 Am. St. Rep. 282; Bowler v. O'Connell, supra, note 8; Driscoll v. Scanlon, supra, note 20; Schulwitz v. Delta Lbr. Co., 126 Mich. 559, 85 N. W. 1075; Mahler v. Stott, 129 Mich. 614, 89 N. W. 340; Karas v. Burns, supra, note 18; Zampella v. Fitzhenry, 97 N. J. L. 517, 117 Atl. 711; Dover v. Mayes Mfg. Co., supra, note 1; Flower v. Penna. R. Co., supra, note 3; Hughes v. Murdoch Storage & Transfer Co., 269 Pa. St. 222, 112 Atl. 111; Perrin v. Glassport Lbr. Co., supra, note 5; Foster-Herbert Cut Stone Co. v. Pugh, 115 Tenn. 578, 93 S. W. 572, 112 Am. St. Rep. 881, 4 L. R. A. (N. S.) 804; Virginia Midland R. Co. v. Roach, supra, note 6; Christie v. Mitchell, 93 W. Va. 200, 116 S. E. 715.

(23) Kalmich v. White, supra, note 10; Salemme v. Malloy, supra, note 13.

(24) Salemme v. Malloy, supra, note 13; Routt v. Look, supra, note 13.

master.[25] If the trespasser had surreptitiously boarded a vehicle driven by the master himself and there remained without his knowledge, it is clear that there would be no liability for injury to the trespasser, even though due to the most wanton negligence in the operation of the vehicle.[26] Nor would the master be liable if the presence of the trespasser were unknown to a servant in charge of the vehicle.[27] How then can the result be different where the guilty knowledge of the servant is, so far as the master is concerned, no knowledge or notice at all?

To illustrate, suppose the child gets on the vehicle at the unauthorized invitation of the servant and conceals himself. If the master should then replace the servant on the vehicle, he would have neither actual nor constructive knowledge of the presence of the trespasser, for as seen, the presumption is that the servant did not communicate his guilty knowledge to the master. Under such circumstances the master, owing no duty to the trespasser, because undiscovered, would not be liable for injury to him through wanton negligence in the operation of the truck. And if the master would not be liable for his own wanton act, certainly he would not be liable for the execution of the act in the same manner through a servant.

As elemental as this principle may seem, it has, strangely enough, apparently not been considered in any of the decided cases.

The Massachusetts court has without reservation held the master not liable for wanton injury where the presence of the trespasser on the vehicle is in response to the unauthorized invitation of the servants.[28] The reason assigned for the decision is that the injury to the trespasser is the direct and proximate consequence of the unauthorized permission to ride on the vehicle, a continuing act of the servant without the scope of his employment. The court points out that although in the reckless driving of the vehicle the servant was acting within the scope of his employment *quoad a third person lawfully using the street,* he was without the scope of his employment in permitting the trespasser to ride on the vehicle. The theory, in other words, is that so far as the servant's invitee is concerned, the relationship of master and servant never existed. It was accordingly held that where a third person on the street and the servant's invitee on the vehicle were through the servant's wanton negligence injured in the same accident, only the former could recover from the master.[29]

Perhaps the greater number of courts at least profess to hold with the Ohio court that under such circumstances the servant's invitee may recover from the master.[30] The *rationale* of these cases is that after the servant's invitee has once gotten safely aboard the vehicle, the question of how or why he got there is no longer material. In those jurisdictions stress is laid upon the point that the unauthorized invitation of the servant was merely a condition and not the cause of the injury. The argument then is that the servant's

(25) Culpeper Natl. Bank v. Tidewater Imp. Co., supra, note 14.

(26) Salemme v. Malloy, supra, note 13.

(27) Routt v. Look, supra, note 13.

(28) O'Leary v. Fash (Mass.), 140 N. E. 282.

(29) O'Leary v. Fash, ibid., and McGrath v. Fash, 244 Mass. 327, 139 N. E. 303.

(30) Kalmich v. White, supra, note 10; Gamble v. Uncle Sam Oil Co., 100 Kan. 74, 163 Pac. 627, L. R. A. 1917D, 875; Sanborn v. Merriam, 79 N. H. 492, 111 Atl. 751; Higbee v. Jackson, supra, note 7.

invitee, after getting aboard the vehicle, assumes *quoad* the master, the character of an ordinary trespasser, to whom the master is liable for injury inflicted by a subsequent wanton act of the servant.

This line of reasoning, it will be observed, ignores both the principle above pointed out that the servant's invitee is, as to the master, an *undiscovered* trespasser and also the theory of the Massachusetts court that permitting his invitee to remain on the vehicle is a continuing act of the servant wholly unconnected with his employment. The concurring opinion of Justice Wanamaker in the leading case holding the master liable does not arouse respect for the consideration influencing the Ohio decision.[31] The dissenting opinion of Justice Jones ably upholds the Massachusetts doctrine.

Other courts apparently accept the principle of liability but do not apply it in practice. For instance, in West Virginia the servant in charge of a truck permitted six small children to ride on the running board. According to the plaintiff's evidence, he drove the truck over a rough, unpaved street full of holes, at a rate of speed "faster than a street car." The plaintiff was thrown from the running board and injured when the wheels struck one of these chug holes. In a suit against the master, the jury found for the plaintiff on the theory that the servant was guilty of wanton negligence. The verdict was set aside by the appellate court on the ground that under this evidence the jury's finding of wanton negligence could not be justified.[32]

And in a case involving injury to a boy attempting to mount a milk wagon at the invitation of the servant in charge, the New York Court of Appeals held that the driver was not guilty of wanton negligence (failure to exercise due care for one in a known position of danger) in whipping up his horses just as the plaintiff was climbing upon the wagon.[33]

Cases involving injuries to the child in dismounting fall under two different classifications.

If the driver has stopped for the purpose of allowing him to get off, the injury thus received is clearly a direct and proximate consequence of the original unauthorized invitation, for which the master is not liable, even though the driver be guilty of wanton conduct.[34]

If the child undertakes to leave the vehicle without the knowledge of the driver, the master is not held liable, because not responsible for the servant's negligence in failing to guard against this danger.[35] Where the servant sees the child about to dismount or fall from the vehicle, failure to exercise due precautions for his safety will be held a wanton act. In the decided case[36] the master was held liable, although, as above pointed out, this result can be reached only by ignoring two well established principles of the law of master and servant.

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(31) Higbee v. Jackson, supra, note 7.

(32) Christie v. Mitchell, supra, note 4.

(33) Goldberg v. Bordens Condensed Milk Co., supra, note 8.

(34) Hughes v. Murdoch Storage & Transfer Co., supra, note 22.

(35) Waller v. Sou. Ice & Coal Co., supra, note 22; Foster-Herbert Cut Stone Co. v. Pugh, supra, note 22.

(36) Sanborn v. Merriam, supra, note 30.

EDITORIALS AND COMMENTS

THE STATUTE OF FRAUDS

In 1677, just 250 years ago, the famous Statute of Frauds (29 Ch. 2) was enacted, from which similar provisions have been adopted in almost every state. After two and one-half centuries most of us have come to accept the Statute of Frauds without question as either a necessary and customary evil or a masterpiece of benign legislation, often according to how it affects the particular litigation engaging us at the moment. In 1920 Mr. Charles W. Hawkins' article "Where, Why and When Was the Statute of Frauds Enacted?" appeared in the American Law Review (Vol. 54, p. 867) in which he said:

> There is no greater piece of legislation in human history. So wide has been its latitude that it carries its influence throughout the whole body of our civil jurisprudence, and is, in many respects, the most comprehensive, salutary and important legislative regulation on record, effecting the security of private rights. It stands as a lofty and enduring monument to the genius, logic and equitable abilities of a class of law makers whose facilities, education, environment and experience fitted them for just such a task.

In England, however, it appears that the statute is not regarded with the same favor. The January, 1927 number of the Law Quarterly Review has this to say about it:

> In the present year, 1927, we shall be celebrating an occasion of outstanding and sentimental interest to the legal profession. On March 12, 1677, was enacted the famous Statute of Frauds, 29 Ch. 2, c. iii, so that it has now attained its two hundred and fiftieth anniversary. . . .
>
> This is not the first reference to the Statute of Frauds in our pages. The inaugural article of Volume 1, written by Mr. Justice Stephen, was an attack on section 17 of the Statute of Frauds, substantially re-enacted in the Sale of Goods Act, 1893. Although his remarks were concerned with that section in particular, they apply with equal force to most of section 4. "The special peculiarity of the seventeenth section of the Statute of Frauds is that it is in the nature of things impossible that it ever should have any operation, except that of enabling a man to escape from the discussion of the question whether he has or has not been guilty of a deliberate fraud by breaking his word. In some cases, no doubt, this may protect an honest man against perjury. In others it may enable a man to give judgment in his own favour, that a contract into which he entered, it may be improvidently, is inequitable and ought not to be carried out, but in the vast majority of cases its operation is simply to enable a man to break a promise with impunity, because he did not write it down with sufficient formality"
>
> Not only is the Statute unjust, but it is also uncertain. "It is universally admitted, that no enactment of any legislature ever became the subject of so much litigation" (Smith's Law of Contracts, p. 38, quoted by Leake in "Transactions of the Juridical Society," Vol. 1, p. 271). Year after year new points arise, and even in 1926 judgments on the interpretation of words written two hundred and fifty years ago have been reported. "Can anyone," continues Mr. Justice Stephen, "look at what has been written upon the subject without feeling some indignation at the waste of time, labour, and money, which has been incurred in solving a problem which may be thus stated? 'If the authors of the Statute of Frauds had ever considered the foolish question now before the Court (which it is morally certain they never did), what view are we to guess that they would have taken upon it, our guess being guided by certain artificial rules of construction, the application of which probably vitiates the result arrived at—which result, however, is not of the least importance?' . . . I speak, perhaps, with excusable warmth upon this subject, because I have devoted a great deal of time which might have been better employed to this piece of morbid anatomy."
>
> Nearly thirty years later, in Vol. xxix of this Review, at p. 247, an editorial note said: "Has it ever occurred to upholders of this piece of antiquated legislation that in 1677 the defendant could not give evidence on his own behalf, and that the protection which the Statute conferred upon him is not called for at the present day? We would also add that £10 in the time of Charles II had a different monetary value from that which it bore in 1893, when another section was slavishly re-enacted."
>
> It would be a work of supererogation to refer to the great number of adverse criticisms which have been expressed, both by eminent Judges and by text-book authorities, on this Statute, especially within the past fifty years. Perhaps we may quote Professor Holdsworth ("History of English Law," Vol. vi, p. 396), who cannot be accused of harbouring iconoclastic intentions against the law: "The prevailing feeling both in the legal and the commercial world is, and has for a long time, been, that these clauses have outlived their usefulness, and are quite out of place amid the changed legal and commercial conditions of to-day. This is clearly the last phase."
>
> Lord Nottingham, who prided himself upon being primarily responsible for the Statute, said that "every line was worth a subsidy" ("Lives of the Norths," i. 141). Lord St. Leonards' comment on this remark is well known, "Every line of it has cost a subsidy"—a subsidy paid by honest men to the fraudulent. The Lord Chancellor who—we hope in the near future—succeeds in having the Statute of Frauds repealed will have as much reason to congratulate himself on his work as Lord Nottingham had when it was first enacted.

Which of the above views shall we say is representative of the opinion of the bar

over here? That the Statute in many cases works gross injustice, cannot be doubted. And it often leads to most absurd results. For example, an oral contract to build the Panama Canal would be valid, but an agreement with a colored man to wash your window tomorrow and every week thereafter for a year would be invalid if not in writing.

The date mentioned in the above comment (March 12, 1677) recalls the old, but we hope now settled, controversy as to when the Statute of Frauds was enacted. Mr. Hawkins, in the article mentioned above, said: "The Act was passed by the English Parliament on February 15, 1666, and became effective on the 20th day of June, 1667." None of these dates is correct. Professor Costigan's article in the Harvard Law Review (Vol. 26, p. 329) published in 1913, showed conclusively that the statute was passed on April 16, 1677. By its express provision it became effective June 24, 1677. Protographic and printed reproductions of some of the drafts of the Act were printed in the Pennsylvania Law Review (Vol. 61, p. 283) in 1913, and are particularly valuable as indicating the legislative intent, by the numerous changes made before and during passage.

As pointed out by Professor Costigan, much of the confusion as to the date of enactment arose from the fact that in the "Old Style" calendar, then in use, the year ended on March 24th and began on March 25th. Thus the date given in the Law Quarterly Review, as March 12, 1677, would be almost a year later than the true date, April 16, 1677. In England the present calendar ("New Style") was not adopted until 1751, a fact important to be remembered by the profession in considering old English statutes and cases.

If the judge is to comment on the evidence, should he not be subject to voir dire examination like a juror?

RECENT CASE

JITNEY BUS OWNER HELD LIABLE TO PASSENGER WHO, AFTER ALIGHTING, WAS STRUCK BY STREET CAR.

The facts and decision in Alexander v. Matteucci, 135 Atl. 820, by the New Jersey Supreme Court, are stated in the opinion as follows:

Defendant Matteucci was the owner of a jitney bus operated between Perth Amboy and Metuchen. Plaintiff was a passenger on the bus, and was about to alight at a corner at a point where the defendant Public Service Railway Company operated in the highway a trolley line with a single track, the roadbed of which was not paved or improved. Plaintiff had signaled the driver of the bus to stop at the corner. When the jitney bus came to a stop, the trolley car, according to the testimony produced on the part of the plaintiff, was about 500 feet away, coming at a speed of 30 miles an hour, and giving no warning, and this fact was observed by the jitney bus driver. The testimony further tended to show that the bus came to a stop so that the body of the bus was within two feet of the near rail of trolley line, and the driver of the bus opened the door and permitted the plaintiff to get out without saying anything to her, although the evidence was that the bus driver saw the rapid approach of the trolley car. The testimony further tended to show that the plaintiff was not aware of the approach of the trolley car. It further tended to show that the motorman of the trolley car, though having an unobstructed view, did not decrease the speed of his car until he was about to strike the plaintiff. The evidence also tended to show that, upon being thus let out of the bus practically upon the trolley rail, the plaintiff proceeded to walk across the track, and, when near the far rail, she was struck by the trolley, the driver of the bus not having attempted to warn her until just as she was about to be struck.

Defendant Public Service Railway Company does not contend (and could not successfully) that there was an absence of negligence on its part, nor that the plaintiff was guilty of contributory negligence; but Defendant Matteucei says, not only that there was no negligence upon his part which was the proximate cause of plaintiff's injury, but that the plaintiff was guilty of contributory negligence as a matter of law, and therefore contends that the denial of a nonsuit and directing of a verdict in his favor was improper. We think there is no merit in such a contention, nor can we say that the verdict was against the weight of the evidence.

"An indictment under the National Motor Vehicle Theft Act need not allege the name of the owner or person from whom the vehicle was stolen, its value, nor directly that it was stolen." Abraham v. United States, 15 F (2d) 911.

DIGEST OF IMPORTANT DECISIONS

The name of the state is printed in bold face type to enable you to select cases from any particular state. The cases from the National Reporter System are copyrighted by the West Publishing Co., St. Paul, Minn., from whom a copy of any such decision may be obtained for 25 cents.

APPEAL AND ERROR

Ruling that statement was such a spontaneous utterance as to be admissible as res gestae is within court's discretion, as regards review. Haugh v. Kirsch, 135 Atl. 568, **Conn.**

ATTORNEY AND CLIENT

The evidence sustains the finding of the referee, and accords with our view, that the respondent in this proceeding for disbarment testified falsely in a hearing before the United States district judges. Such false testifying constitutes "professional misconduct" under our statute, for which the respondent should be disbarred. In re Hertz, 211 N. W. 678, **Minn.**

CARRIERS

Owner of jitney bus who stopped within two feet of track of street railway, and allowed passenger to alight without warning her of approach of trolley car which struck her before she crossed track, held guilty of negligence which proximately contributed to injury. Alexander v. Matteucci, 135 Atl. 820, **N. J.**

Under Cummins Amendment to Interstate Commerce Act, as amended by Act Aug. 9, 1916, measure of damages for loss in transit of part of carload of coal, held, the retail market value of such coal at the time and place of delivery, notwithstanding such value included an element of retail profit due to absence of a wholesale market at that place. Leominster Fuel Co. v. New York, N. H. & H. R. Co. 154 N. E. 831, **Mass.**

CONTRACTS

Contract employing plaintiff to procure government contracts for war supplies, compensating plaintiff at fixed retainer per month and 3 per cent commission on gross amount of contracts obtained with government, is invalid as based on contingent compensation, and no recovery, either for commissions or professional services, can be had thereunder. Hardesty v. Dodge Mfg. Co. 154 N. E. 697, **Ind.**

CORPORATIONS

Foreign corporation which installed within the state an ammonia compressor and other machinery and apparatus, employing local labor, held not "engaged in business within the state." Vilter Mfg. Co. v. Evans, 154 N. E. 677, **Ind.**

Where plaintiff, president of company, desired to transfer certain shares of stock owned by him, and made out and signed the new certificates, but defendant, who was treasurer of the company, wrongfully refused to sign them so they could be issued, held, defendant not liable to plaintiff for damages resulting. Handy v. Miner, 154 N. E. 557, **Mass.**

Although a corporation may have acquired real estate in such a manner as to render it subject to be escheated to the state by proper action begun for that purpose, yet if such corporation shall, prior to the commencement of such proceedings escheat, make a bona fide sale or conveyance of said real estate for value, the purchaser at such sale will take a good title thereto. Lord v. Schultz, 211 N. W. 210, **Neb.**

DAMAGES

To show that tuberculosis resulted from body bruises it is not enough, after a long time, to establish mere lessening of resistance, which might have caused disease, for it cannot be said as matter of law that whatever injury lowers vitality is responsible for condition afterward developing, but proof that infecting germ was implanted in body at time of injury is not required. That tuberculosis was brought about by act complained of, may be shown by opinions of qualified experts, who state plainly that, in their professional views, accident was superinducing cause. McMinis v. Philadelphia Rapid Transit Co., 135 Atl. 722, **Pa.**

DEEDS

Use of premises to house automobiles belonging to others is "conducting business" thereon, within restriction of deed, regardless of whether storage space is rented by day or week, or leased by month or year. George v. Goodovich, 135 Atl. 719, **Pa.**

EVIDENCE

An estimate of train's speed based simply on an opinion of force of impact is not evidence of speed. Hinderer v. Ann Arbor R. Co., 211 N. W. 734, **Mich.**

Testimony that, if taxicab had continued in a straight course, automobile collision would have been avoided, held not opinion, but statement of fact, in view of witness' location of positions of cars. Taxicab Co. v. Ottenritter, 135 Atl. 587, **Md.**

Where no evidence was offered to show that break, claimed to be shown on plaintiff's car by photograph taken after collision, had been made prior to accident and might have tended to cause collision, it was proper to exclude photograph for such purpose. Walsh v. Studwell, 135 Atl. 554, **Conn.**

Conversation with deceased on day of her death, stating that she was going to meet defendant that evening, held admissible to show intention to do so. Basis of admission of declarations to prove intention otherwise, rather than that they are part of the res gestae; hence question whether they accompany or are part of relevant act is immaterial. Commonwealth v. Marshall, 135 Atl. 301, **Pa.**

FRAUDS, STATUTE OF

Memorandum signed by vendor's agent, reciting receipt of $100 check on purchase price of realty at specified price, subject to mortgages, balance cash, contract to be drawn by agent and approved by purchaser's attorney, held mere receipt, and insufficient memorandum within statute, where parties contemplated that date of closing, apportionment of rent, and taxes agreed on, should be incorporated in formal contract. Savage v. Weigel, 219 **N. Y.** Supp., 99.

HIGHWAYS

Candies, tobacco, and soft drinks furnished highway contractor are not, as matter of law, "necessaries," defined as indispensable, etc., so as to be covered by bond obligating surety to pay for material furnished in construction of highway. Overman & Co. v. Maryland Casualty Co., 136 S. E. 250, **N. C.**

INSURANCE

Bond guaranteeing obligees against any loss by reason of any dishonest act of employee held to cover losses sustained by obligees due to employee's act in concealing obligees' financial condition, dishonestly declaring dividends, knowing obligees to be insolvent, in loaning money to irresponsible persons, and in using money belonging to others in custody of obligees, causing it to be lost. National Surety Co. v. Fletcher Savings & Trust Co. 154 N. E. 672, **Ind.**

INTOXICATING LIQUORS

In contempt proceeding for violating liquor injunction, defendant is not entitled as matter of right to jury trial nor to meet witnesses against him face to face; Const. article being inapplicable. State v. Kaufman, 211 N. W. 691, **S. D.**

Testimony that officers drained dregs from empty or castaway bottles found on defendant's premises, and thereby obtained an ounce of whisky, held insufficient to sustain conviction, under National Prohibition Act, for unlawful possession. Chorak v. United States, 15 F. (2d) 945, **Wash.**

A proceeding in rem may be instituted and carried to judgment without personal service on claimants within state or notice by name to those outside of it; hence automobile may be forfeited under statute for use in liquor traffic, though owner personally committed no wrong and did not know of forfeiture proceedings. E. J. Fitzwilliam Co. v. Commonwealth, 154 N. E. 570, **Mass.**

JUDGMENTS

Where malpractice was set up merely as defense to physician's action for services in justice court, defendant was thereafter barred from bringing separate suit against physician for malpractice; it being optional with him whether he would defend in justice court, and, having elected to do so, must abide thereby. Leslie v. Mollica, 211 N. W. 267, Mich.

Where notes providing for attorney's fees and secured by chattel mortgage were set up by plaintiff by intervention in a suit by others to enforce liens against the mortgaged property, in which service was by publication, and in a court of a state where by statute such provisions for attorney's fees were void, the fact that plaintiff did not claim attorney's fees therein, and that they were not included in its judgment in rem did not preclude it, on the ground that it had split its cause of action, from claiming them in a subsequent action against the makers to recover a deficiency. Taylor v. Continental Supply Co., 16 F. (2d) 578.

LIABILITY INSURANCE

Insurer held estopped to set up agent's lack of authority to advise insured that renewal contract, insuring against injuries to public caused by insured's automobile, would furnish protection if car was driven by son, notwithstanding required written indorsement, where insurer did not notify agent of disapproval or object to proposed change when notified of facts. Thomas v. Employers' Liability Assur. Corporation, 135 Atl. 614, **Pa.**

LIBEL AND SLANDER

Headline of newspaper article, reciting that theatrical producers "gouged $1,000 from Klein Bros.," held capable of construction that it charges plaintiffs with having deceived, defrauded, or imposed on Klein Bros., and libelous per se, as holding plaintiffs up to hatred, contempt, or ridicule; "gouge" meaning to cheat, overreach, deceive, defraud, impose on, trick, or mislead. Shubert v. Variety, Inc., 219 **N. Y.** Supp. 233.

LICENSES

Where corporation agreed to exchange certain amount of capital stock for warehouse belonging to defendant, and pursuant to such agreement tendered stock which was the exclusive property of its president, held transaction was not violative of Blue Sky Law, nor was the transaction rendered invalid because plaintiff corporation thereafter passed a resolution providing for the reimbursing of its president. O-So-White Products Co. v. Richards Mfg. Co. 211 N. W. 646, **Mich.**

WORKMEN'S COMPENSATION

A well driller, who was hired to sink a well, and was to furnish machine and helper, held not an independent contractor, but an "employee" and within the protection of the Workmen's Compensation Act. Lynch v. Hutchinson Produce Co., 211 N. W. 313, **Minn.**

Statute providing for employment of convicts on highways and allowing them pay therefor termed "earnings," held to create relation of master and servant between convict so employed and State Highway Commission, and to make convict "employee" under Workmen's Compensation Act. California Highway Commission v. Industrial Accident Com'n, 251 Pac. 808, **Cal.**

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The abbreviations used (other than conventional) are as follows:

Am.—American.
B.—Bulletin.
C. L. J.—Central Law Journal.
J.—Journal.
L.—Law or Legal.
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Reg.—Register.
Rep.—Reporter.
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